SUPREME COURT, U. S.

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No. 631

In the
Supreme Court of the United States
OCTOBER TERM, 1968

YELLOW CAB COMPANY,
a Maine corporation,

Petitioner,

vs.

DEMOCRATIC UNION ORGANIZING COMMITTEE,
LOCAL 777, S.I.U.N.A., AFL-CIO,

Respondent.

PETITIONER'S REPLY BRIEF

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The Scheffer Press, Inc.—ANdover 3-6850

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PETITIONER'S REPLY BRIEF

Several erroneous assertions in Respondent's Memorandum opposing the Petition herein require this response.

1.

A REVIEW OF THE MERITS OF THE AWARD IS NOT BEING SOUGHT.

The substantive issue in the arbitration proceeding was whether the employee's discharge was just or unjust. The decision on this issue constitutes "the merits of the award." No review of the decision of this issue was

requested[1] either of the District Court or of the Court of Appeals; nor is such a review by this Court sought by the Petitioner.

Jurisdictional questions do not constitute "the merits" and it is only the arbitrator's ruling concerning his own jurisdiction of which review has been requested by the Petition.

2.

THERE IS A CONFLICT BETWEEN THE CIRCUITS.

In *Torrington*[2] it was held that an arbitrator could not be permitted to *add* to the contract a provision not stated therein. In this case the arbitrator *violated* a provision already there, i.e., that grievances be placed in writing and appealed within certain prescribed periods.

There can be no valid distinction between the nature of these two rulings so as to deny the existence of a conflict. The opposing Circuit Court rulings deal with the same standard labor contract provision which denies power and jurisdiction to *modify* or *alter* the contract as well as to *add to* its provisions. To distinguish the act of an arbitrator modifying, altering or violating the contract from his act in adding to it would create a distinction without a supportable difference. A decision affirming an arbitrator's unrestrained power to modify, alter, or violate stated contract provisions while denying his right to supplement them would be an affront to rational fairness.

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[1] On this point, also, the award was incomprehensible. The driver either was supersensitive to small amounts of fumes or imagined non-existent fumes. A warning to him before discharge could not have changed this condition and would have served no sensible purpose.

[2] *Torrington Co.* v. *Metal Product Workers Union,* 362 F. 2d 677 (CA 2, 1966).

3.

AN ARBITRATOR'S RULING ON HIS OWN JURISDICTION IS SUBJECT TO JUDICIAL REVIEW.

The decisions cited by Respondent indicating jurisdictional matters are "for the arbitrator to decide" concern proceedings to compel arbitration. In those cases arbitration had not yet taken place; therefore there was no decision which could be reviewed. While ordering that arbitration proceed, the Courts have recognized that, *after an award is issued,* it is subject to judicial review. Upon such review, jurisdictional matters are for the *Court* to decide.

This Court has pronounced that an award should not be enforced when it does not "draw its essence from the collective bargaining agreement," dispenses the arbitrator's "own brand of industrial justice" or manifests "an infidelity to [his] obligation" under the Agreement.[3]

Enforcement is unlikely to be denied without a review.

4.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE PETITION.

More than 5,000 cases, it is estimated,[4] concerning timeliness or writing requirements applicable to grievances were

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[3] See quotations from *Enterprise* and *Livingston* stated on pages 8 and 9 of the Petition.

[4] The digest of the B.N.A. Labor Service under headings § 93.466 through §§ 93.4669 shows 202 cases reported in Volumes 21 through 49 of the B.N.A. Labor Arbitration Reports. These cover the period from September, 1953, through February, 1968. It is estimated that only 4% of arbitration awards issued find their way into publication. *Hayes, Labor Arbitration* — A Dissenting View, p. 53 (Yale Univ. Press, 1966). 202 cases reported are 4% of 5,050 cases estimated to have been arbitrated.

arbitrated between September, 1953 and February, 1968. Over the entire period this amounts to almost 350 such cases per year. The total number of *all* arbitrated disputes concerning an arbitrator's jurisdiction is, of course, far greater.

This Court, by a decision in this case, can materially reduce the number of disputes in the future through an authoritative pronouncement of the principles controlling an arbitrator's determination of his own jurisdiction.

C.

THE U.S. ARBITRATION ACT DOES REQUIRE A REVIEW OF THE ARBITRATOR'S RULING HEREIN.

Within the last few weeks this Court applied the U. S. Arbitration Act and vacated an award where an arbitrator failed to disclose to one party a previous sporadic business relationship with the other party.[5] In that case no bias was alleged against the arbitrator and there was no reason to suspect that he was actually biased.

Here, bias evident on the face of the award is charged. Here, also, it is charged that the arbitrator exceeded his powers. Both allegations present a basis, under the specific wording of the statute, for the award to be vacated.

The U. S. Arbitration Act was also before this Court in the *Newark Stereotypers*[6] case cited by Respondent.

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[5] *Commonwealth Coatings Corp.* v. *Continental Casualty Co. et al* decided November 18, 1968 (No. 14 October Term 1968)

[6] *Newark Stereotypers' Union No. 18* v. *Newark Morning Ledger Co.*, 397 F. 2d 594 (CA 3, 1968), cert. den. November 18, 1968 (No. 498 October Term 1968)

In that case the district court did review the arbitrators' ruling. No bias was alleged. The contested conduct was held not to have affected the fairness of the proceeding.

Thus in two separate cases resolved on the same day (one of which concerned arbitration of a labor dispute), this Court has upheld a review of an arbitration decision through application of the Arbitration Act. The basis for the review in those cases was much less compelling than it is here, where the arbitrator's ruling on his own jurisdiction is challenged.

CONCLUSION

In this ideally suited case this Court should lay to rest the misunderstanding, uncertainty and proliferation of litigation which has emanated from its Steelworkers' trilogy decisions.

Respectfully submitted,

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